



**Josap Logistics & Supplies Limited v Great Rift Valley Drilling (Kenya)
Ltd; Coulson (Interested Party) (Commercial Case 359 of 2016)
[2025] KEHC 385 (KLR) (Commercial and Tax) (27 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 385 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 359 OF 2016
A MABEYA, J
JANUARY 27, 2025**

BETWEEN

JOSAP LOGISTICS & SUPPLIES LIMITED PLAINTIFF

AND

GREAT RIFT VALLEY DRILLING (KENYA) LTD DEFENDANT

AND

DAVID JAMES STEWART COULSON INTERESTED PARTY

RULING

1. The interested party filed a Motion on notice dated 19/10/2023 pursuant to the provisions of Order 5, Order 9 Rule 9, Order 10 Rule 10, Order 22 Rules 22, 25, & 34, and Order 51 Rules 1 & 15 of the Civil Procedure Rules 2010, and sections 1A, 3, 3A, & 80 of the *Civil Procedure Act*, Articles 1(1) & (3)(c), 2(1), (2), (3), & (4), 3(1) & (2), 10, 19, 20, 21, 22, 23, 24, 25 (a) & (c), 27, 28, 29, 47, 48, 49, 50, 159, 258, 259(1), (3), & (11) of the *Constitution* of Kenya.
2. It sought, inter alia, that David James Stewart Coulson be joined to this case as an interested party, that all execution proceedings against Coulson be set aside and that the applications dated 15th & 16th February 2022 be scheduled for hearing before a judge.
3. The application was premised on the grounds set out on the face of the Motion and the affidavit sworn on 19/10/2023 by David James Stewart Coulson. The interested party, a Director of the defendant company, stated that a default judgment was entered in favour of the plaintiff against the defendant leading to the decree of 5/7/2019.



4. That the plaintiff alleged lack of knowledge of the defendant's assets and applied for discovery to aid in execution, on ground that the defendant had concealed its assets out of malice. However, although he was not served with the said application, in a ruling made on 22/1/2020, the Court directed that the defendant's directors be examined under oath regarding the defendant's assets and show cause why the decree should not be enforced against him personally.
5. He further stated that the defendant, represented by Njuguna, Kahari & Kiai Advocates, filed an application to set aside the interlocutory judgment, but the same was dismissed on 5/7/2021. Thereafter, he and the defendant filed applications dated 15th and 16th February, 2022, challenging the claimed amounts, the alleged service of documents, and the attempt to hold him personally liable for the defendant's debts.
6. On 27/5/2022, the parties agreed by consent that the outstanding sums would be resolved, and the interested party would be released from liability. However, Mr. Coulson contends that the consent was signed under duress due to his unlawful arrest and did not affect the pending applications.
7. He further contended that no personal decree was issued against him. That the Deputy Registrar lacked jurisdiction to give directions on the applications dated 15th & 16th February, 2022. That he was never served with a Notice to Show Cause or witness summons, making the warrants of arrest issued against him unlawful and void. He contended that the plaintiff was misusing the criminal measures to recover a civil debt. Finally, that the ongoing execution proceedings violated his rights to a fair trial, administrative justice and access to justice, potentially causing him to suffer irreparable harm.
8. In opposition, the plaintiff filed a Notice of Preliminary Objection dated 17/11/2023 on the ground that the motion dated 19/10/2023 is res judicata and should therefore be dismissed with costs.
9. The plaintiff also filed a replying affidavit sworn on 17/11/2023 by Joseph Mwangi Wachuiri, a director with the plaintiff. It was contended that the application was res judicata, as Hon. Stephany Bett had previously ruled on a similar application on 6/10/2023. That the application related to the plaintiff's Notice to show cause dated 4/8/2023, which sought to enforce the decree for Kshs. 24,851,058/=.
10. That after the said decree was issued, the plaintiff filed an application on 19/12/2019, seeking to pierce the defendant's corporate veil. That the same was granted on 5/3/2020. Due to the defendant's failure to pay the decretal sum, the defendant's corporate veil was lifted thereby making Coulson and Badenhorst personally liable for the debt. That the outstanding amount was had accrued interest and now stood at Kshs. 43,009,216.51.
11. Mr. Wachuiri swore that the interested party violated the terms of the fuel delivery contract, effectively making the company a sham, which justified the execution action under the notice dated 4/8/2023. That in response to the aforesaid Notice to Show Cause, the interested party filed a notice of change of advocates, a cross-examination notice, and a replying affidavit, all dated 18/8/2023. That he however failed to provide reasons why execution should not proceed and instead contested the service of documents. On 6/10/2023, the Court granted permission for execution against him.
12. The respondent also highlighted previous efforts to execute against the interested party, including a case in July 2022 where the interested party was released on cash bail following a consent order with Galana Oil Ltd. Mr. Wachuiri termed the interested party as a habitual defaulter.
13. The parties filed their respective submissions. The interested party's submissions were dated 5/12/2023 while those of the plaintiff submissions were dated 20/5/2024.



14. The interested party argued, citing Section 21 of the High Court (Organisation and Administration) Act, as well as Order 22 and Order 49 Rules 5 & 7 of the Civil Procedure Rules 2010, that the Deputy Registrar lacked jurisdiction to hear and determine the Notice to Show Cause dated 4/8/2023 issued to the interested party and the applications dated 15th & 16th February 2022.
15. That the Deputy Registrar's authority in matters of decree execution and committing judgment debtors to civil jail applies only to uncontested issues. That since the interested party raised objections, including challenging the legality of the Notice to Show Cause, the matter should have been referred to a High Court Judge for hearing and determination.
16. It was further submitted that the consent order adopted on 30/5/2022 had settled the dispute between the parties. That the plaintiff had ignored the said orders and continued to pursue the interested party for payment of the decretal sum. That since the said order had neither been varied and/or set aside, the plaintiff should be estopped from relying on the earlier orders of 11/3/2020. That the Motion was not res judicata.
17. On the other hand, the plaintiff relied on the Supreme Court case of John Florence Maritime Services Limited & Another v Cabinet Secretary Transport & Infrastructure & 3 Others KESC 39(KLR) and submitted that the application was res judicata for it was a replica of many other applications filed in the past by the interested party. It was urged that the Motion be dismissed for being an abuse of the Court process, noting that this matter has been in Court for approximately nine years now.
18. Having considered the rival affidavits, the Notice of Preliminary Objection and the submissions, the issues that arise for determination are: -
 - i. Whether the application was res judicata; and
 - ii. Whether the interested party is entitled to the orders sought.
19. The doctrine of res judicata is provided for under the section 7 of the [Civil Procedure Act](#) which provides: -

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
20. It is settled that this doctrine ousts the jurisdiction of a Court to try any suit or issue which has been determined with finality by a Court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title. For this doctrine to be effectively invoked, the party raising it must satisfy the doctrine's five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that –
 - i. The suit or issue raised was directly and substantially in issue in the former suit;
 - ii. That the former suit was between the same parties or parties under whom they or any of them claim;
 - iii. That those parties were litigating under the same title;
 - iv. That the issue in question was heard and finally determined in the former suit; and



- v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.
21. The plaintiff contended that the application was res judicata since the interested party had in the past filed similar applications. He averred that on 6/10/2023, the interested party made a similar application orally before the Deputy Registrar but the said application was dismissed. The interested party on the other hand submitted that the only application made by him on the said 6/10/2023 before the Deputy Registrar was for an adjournment to prepare for the Notice to Show Cause hearing, which had been listed as a mention, not a hearing.
22. Upon perusal of the Court record, it is noted that the parties appeared before the Deputy Registrar on 6/10/2024 when two applications were made. The first application was for an adjournment to prepare for the Notice to Show Cause hearing which was denied and the hearing proceeded and a ruling was set for 27/10/2023. The second application was that, the Court directs that the said ruling be delivered in open Court and for the interested party to deposit his passport in Court before close of business. The second application was partly allowed with the Court giving directions that the ruling of 27/10/2023 was to be delivered in open Court in the presence of the interested party.
23. From the foregoing, it is clear that the issues raised in the present application were neither raised nor determined by the Deputy Registrar on the 6/10/2023. Accordingly, this Court finds that the doctrine and/or defence of res judicata is not applicable.
24. On the second issue, the Interested party sought for an order that he be joined to these proceedings as an interested party. The Black's Law Dictionary, 9th Edition (at p.1232), defines an Interested Party as a party who has a recognizable stake (and therefore standing) in a matter. In *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* [2014] eKLR, the Supreme Court of Kenya held that: -
- “Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause”
25. The guiding principles encompassing the enjoinder of an interested party to a suit were articulated by the Supreme Court in *Attorney General v David Ndii & 73 others* (Petition 12 (EO16) of 2020) [2021] KESC 17 (KLR) (9 November 2021) (Ruling) as hereunder: -
- “The guiding principles applicable in determining an application to be enjoined as an interested party in were:
- a. one had to move the court by way of a formal application. Enjoinder was not as of right, but was at the discretion of the court; hence, sufficient grounds had to be laid before the court, on the basis of the following elements:
- i. the personal interest or stake that the party had in the matter had to be set out in the application. The interest had to be clearly identifiable and had to be proximate enough, to stand apart from anything that was merely peripheral.
- ii. The prejudice to be suffered by the intended interested party in case of non-joinder, had to also be demonstrated to the



satisfaction of the court. It had to also be clearly outlined and not something remote.

- iii. A party's application had to set out the case and/or submissions it intended to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that those submissions were not merely a replication of what the other parties would be making before the court."

26. It is not in contest that the interested party is a director of the defendant against whom the plaintiff has obtained a valid judgment and decree. It is further not disputed that the defendant's corporate veil was pierced by the Court (Tuiyo J, as he then was) on 11/3/2020 and the interested party held to be personally liable for the debts of the defendant. Subsequently, the plaintiff took out a Notice to Show Cause against him which is currently pending ruling before the Deputy Registrar. Further, from the pleadings and submissions filed by the parties, it is noteworthy that they did not submit on this issue.
27. The view the Court takes is that, having been made liable for the defendant's debt, the interested party herein does not necessarily need to be joined to these proceedings as an interested party for him to appear before this Court in this matter, and/or apply to Court for various reliefs. He is already a party held to be personally liable in these proceedings.
28. The interested party also sought for the setting aside of the execution proceedings herein. On perusal of the interested party's affidavit in support of the application and his submissions, I note that other than challenging the orders issued by the Court piercing the defendant's corporate veil and holding him personally liable for the defendant's debt, the interested party is also challenging inter alia service of the Notice to Show Cause currently before the deputy registrar, and the jurisdiction of the Deputy Registrar to hear and determine the said Notice to Show Cause.
29. The Deputy Registrar's jurisdiction in matters execution is provided for under Order 49 of the Civil Procedure Rules which provides that: -

"Formal orders for attachment and sale of property and for the issue of notices to show cause on applications for arrest and imprisonment in execution of a decree of the High Court may be made by the registrar or, in a subordinate court, by an executive officer generally or specially thereunto empowered by the Chief Justice by writing under his hand, but in the event of any objection being taken to the proceedings thereunder, all further proceedings shall be before a judge."
30. From the pleadings filed, it is evident that the interested party challenges the legality of the Notice to Show Cause dated 4/8/2023 on grounds that it was not served on him, there is no valid judgment and/or decree against him, and that the defendant's corporate veil ought not to have been lifted. While there may have been no judgment against the interested party, the defendant's corporate veil was pierced and its liability bestowed on the interested party. In this regard, the argument that there is no valid decree against him holds no water.
31. On the issue of whether or not service of the Notice to Show Cause was effected on him, the Court's opinion is that, whether or not Notices to Show Cause have been served is not one of the objections contemplated under Order 49 Rule 5 of the Civil Procedure Rules. The Court's view is that that is an issue that is correctly within the purview of the Deputy Registrar's jurisdiction since it is for the Deputy Registrar to ascertain whether or not the notice was properly served before proceeding to hearing the same.



32. In the premise, this Court finds that the interested party has not made a case to warrant this Court to set aside the execution proceedings.
33. The interested party contended that the Deputy Registrar gave directions to the effect that the consent between the parties filed and adopted by this Court on 30/5/2022 settled the applications dated 15th & 16th February 2022, thus the said applications were no longer live matters. This order and/or directions by the Deputy Registrar have not been varied and/or set aside therefore there are still valid and enforceable. For this reason, if at all the interested part was dissatisfied with the said directions, he ought to have approached the Deputy Registrar with an application for review of the said directions, and/or appealed against them to the High Court, in the manner provided for by the law.
34. In the premise, this Court declines to give directions to the effect that the applications dated 15th & 16th February 2022 be placed before a judge for hearing.
35. The upshot of the foregoing is that the application is bereft of merit and is therefore dismissed with costs to the plaintiff.

It is so ordered.

SIGNED AT NAIROBI THIS 16TH DAY OF JANUARY, 2025.

A. MABEYA, FCI Arb

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY, 2025.

F. GIKONYO

JUDGE

MABEYA, J.

